STATE OF MICHIGAN

COURT OF APPEALS

KAREN MAYVILLE,

Plaintiff-Appellee,

v

FORD MOTOR COMPANY,

Defendant-Appellant.

UNPUBLISHED
October 26, 2006

No. 267552
Wayne Circuit Court
LC No. 04-423557-NZ

Before: Murray, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

In this case alleging racial and sexual discrimination and harassment, and unlawful retaliation, under the Michigan Civil Rights Act, ("MCRA"), MCL 37.2101 *et seq*., as well as a common-law claim for intentional infliction of emotional distress, defendant appeals by leave granted from the trial court's order denying its motion for summary disposition. We reverse.

I

Plaintiff, a white female, worked at defendant's Wayne Assembly Plant. She and another employee were required to install the headliner in the interior of vehicles. In 2001, Shanise Tucker, an African-American female, became plaintiff's supervisor. Plaintiff and several other employees found Tucker to be abrasive and prone to berate and scold employees instead of working with them to solve problems. Plaintiff submitted three internal grievances to defendant's Labor Relations department complaining about Tucker's "abusive supervision" and unfair treatment, but none of these complaints alleged that Tucker harassed or mistreated plaintiff because of her sex or race. Other employees also complained about Tucker's abrasive personality, but there were no complaints regarding sexual or racial discrimination. Labor Relations personnel investigated plaintiff's complaints and found that Tucker needed to improve her management skills, but no disciplinary action was taken against Tucker.

In early 2001, Tucker tried to revoke plaintiff's headliner classification, but the union blocked her efforts. In August 2001, plaintiff went on a medical leave of absence, purportedly because she was distressed by Tucker's mistreatment. Plaintiff does not allege that she was terminated or demoted, or that she suffered a loss in pay, benefits, or seniority as a result of her leave of absence.

Plaintiff brought this action against defendant, asserting claims for race and sex discrimination, racial and sexual harassment, and unlawful retaliation under the MCRA, and a common-law claim for intentional infliction of emotional distress. Defendant moved for summary disposition of all claims under MCR 2.116(C)(10), but the trial court denied the motion.

II

We review de novo a trial court's decision on a motion for summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). In reviewing a motion for summary disposition, we view all evidence in a light most favorable to the non-moving party. Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 539-540; 683 NW2d 200 (2004); MCR 2.116(C)(10); (G)(4).

Defendant first argues that it was entitled to summary disposition of plaintiff's claims for race and sex discrimination. MCL 37.2202(1)(a) provides that an employer may not "[f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . race . . . [or] sex . . . ." A plaintiff may prove discriminatory treatment in violation of the MCRA by either direct evidence or indirect or circumstantial evidence. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). In cases involving direct evidence of discrimination, a plaintiff may prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case. *Id.* Direct evidence of discrimination is evidence "which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001), quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999).

In cases involving indirect or circumstantial evidence, a plaintiff must proceed by using the burden-shifting approach set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Sniecinski*, *supra* at 133-134. This framework requires the plaintiff to show that she is (1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and that (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct. *Venable v Gen Motors Corp*, 253 Mich App 473, 477; 656 NW2d 188 (2002). Once a plaintiff has presented a prima facie case of discrimination, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Sniecinski, supra* at 134. If a defendant produces such evidence, the presumption is rebutted, and the burden shifts back to the plaintiff to show that the defendant's reasons were not the true reasons, but a mere pretext for discrimination. *Id.*

Plaintiff failed to establish a prima facie case of race discrimination by either direct or indirect evidence. Although plaintiff presented evidence that Tucker was verbally abusive and acted unfairly, plaintiff failed to show that Tucker's conduct was directed at her on account of her race or sex.[1] Plaintiff did not identify any non-white or male employee who allegedly received more favorable treatment from Tucker, nor did plaintiff allege that Tucker singled out her, or any other person, for verbal abuse because of their race or sex. Plaintiff acknowledged that Tucker was abrasive to all employees, and plaintiff's male headlining partner filed a grievance against Tucker that echoed plaintiff's complaints of mistreatment and unfairness by Tucker.

In support of her race discrimination claim, plaintiff relies on an incident in which Tucker once called her a "white bitch," and an occasion in which Tucker once boasted that the NAACP would back her up if the union tried to take action against her. The "white bitch" comment was the only racially-tinged remark that was made during the many exchanges between plaintiff and Tucker over the eight-month period in which Tucker allegedly harangued plaintiff every day. In this context, this stray remark is insufficient to show race discrimination. See *Krohn v Sedgwick James, Inc*, 244 Mich App 289, 292-293; 624 NW2d 212 (2001). There is no evidence that anyone with authority over Tucker knew of or approved this remark. Tucker's comment about the NAACP, when viewed in context, reveals nothing about Tucker's attitude toward plaintiff. Plaintiff testified that she listened to a conversation between Tucker and the union committeeman, Dan Covert, regarding plaintiff's grievances. Tucker accused Covert of harassing her, and she told him that "if the union did anything [plaintiff] didn't have a chance in hell because the NAACP would back her up." This remark reveals Tucker's perception that she was the victim of racial discrimination; it does not establish a question of fact regarding Tucker's motives toward plaintiff.

Plaintiff argues that Tucker's comments serve as evidence that Tucker mistreated plaintiff on account of her race, regardless of what her reasons might have been for mistreating other employees. But claims of employment discrimination require proof that similarly situated persons outside the protected class were not affected by the employer's adverse conduct. *Venable, supra* at 477. Because the evidence indicated that all employees were subjected to Tucker's abrasive management style, plaintiff cannot satisfy this requirement.

We conclude that plaintiff failed to establish a prima facie case of race or sex discrimination and, therefore, the trial court erred in denying defendant's motion for summary disposition of these claims.

III

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[1] Defendant argues that plaintiff was not subjected to an adverse employment action or condition, but rather voluntarily took a medical leave of absence. In response, plaintiff argues that Tucker's mistreatment constituted discrimination with respect to the conditions of employment, and that she would not have needed to take the leave of absence but for Tucker's conduct. Because we conclude that plaintiff cannot establish that Tucker treated her differently on account of her race or sex, we need not address these questions.

Defendant also argues that it was entitled to summary disposition with respect to plaintiff's claim for hostile environment racial and sexual harassment. We agree. The MCRA's ban on sexual discrimination encompasses sexual harassment. MCL 37.2103(i). The statute does not contain an analogous provision defining racial discrimination to include racial harassment, but this Court has held that "harassment based on any one of the enumerated classifications is an actionable offense." *Malan v Gen Dynamics Land Systems, Inc*, 212 Mich App 585, 586-587; 538 NW2d 76 (1995); see also *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 626-627; 576 NW2d 712 (1998).

To establish a claim of hostile environment sexual or racial harassment in the workplace, a plaintiff must demonstrate that: (1) the employee belonged to a protected group; (2) the employee was subjected to conduct or communication on the basis of sex or race; (3) the conduct or communication was unwelcome; (4) the unwelcome conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. *Rymal v Baergen*, 262 Mich App 274, 312; 686 NW2d 241 (2004).

A. Racial Harassment

With one exception, plaintiff has not shown that the offensive conduct was racial in nature. In *Haynie v Dep't of State Police*, 468 Mich 302, 304; 664 NW2d 129 (2003), our Supreme Court held that "conduct or communication that is gender-based, but is not sexual in nature, does not constitute sexual harassment as that term is clearly defined in the CRA." Only conduct or communication that is sexual in nature can constitute harassment within the meaning of the statute. *Id.* at 312. By analogy, only conduct or communication that is racial in nature can constitute actionable racial harassment. Although plaintiff raises several complaints about Tucker's conduct and mistreatment, the "white bitch" epithet is the only relevant incident of a racial nature.

This isolated remark is insufficient to establish that plaintiff was subjected to a racially hostile environment. Whether a hostile work environment existed is determined by whether a reasonable person, in the totality of circumstances, would have perceived the conduct at issue as substantially interfering with the plaintiff's employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment. *Radtke v Everett*, 442 Mich 368, 372; 501 NW2d 155 (1993). Relevant circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v Forklift Systems, Inc*, 510 US 17, 23; 114 S Ct 367; 126 L Ed 2d 295 (1993). Tucker's "white bitch" comment involved a single occurrence of an offensive utterance, which was neither threatening nor humiliating. A single incident will create a hostile work environment only in rare and extremely traumatic circumstances, such as a sexual or violent assault. *Radtke*, *supra* at 395. Tucker's isolated utterance does not rise to this level.

Furthermore, plaintiff failed to satisfy the respondeat superior requirement of a racial harassment claim. An employer is liable for hostile environment harassment if it fails to take prompt and appropriate remedial action after receiving adequate notice of the harassment. *Chambers v Trettco, Inc*, 463 Mich 297, 318-319; 614 NW2d 910 (2000). The plaintiff can demonstrate that the employer knew of the harassment by showing that she complained to higher

management or by showing that the harassment was so pervasive that it gave rise to the inference of knowledge or constructive knowledge. *Sheridan v Forest Hills Pub Schools*, 247 Mich App 611, 621; 637 NW2d 536 (2001). General complaints of misconduct that do not specify the sexual (or racial) nature of the harassment do not serve as adequate notice of sexual or racial harassment. *Id.* at 624. Here, plaintiff filed three internal grievances complaining of Tucker's conduct, but never complained of racial harassment. There is no other evidence that defendant knew or should have known of any racial harassment in the workplace.

Thus, defendant was entitled to summary disposition with respect to plaintiff's claim for racial harassment.

B. Sexual Harassment

Plaintiff claims that Tucker subjected her to a hostile work environment by making improper remarks of a sexual nature, and by unnecessarily touching and bumping into her.

To the extent that the incidents in question could be viewed as sexual in nature, there is no evidence that they were directed at plaintiff on the basis of her sex. A plaintiff claiming harassment by a member of her own sex must show that the harassment was directed at her on account of her sex. In *Barbour v Dep't of Social Services*, 198 Mich App 183, 186; 497 NW2d 216 (1993), this Court held that a male supervisor's homosexual overtures to a male plaintiff constituted sexual harassment because they were directed at the plaintiff on the basis of his sex. In *Oncale v Sundowner Offshore Services, Inc*, 523 US 75, 79-80; 118 S Ct 998; 140 L Ed 2d 201 (1998), the United States Supreme Court held that same-gender sexual harassment is actionable under Title VII if the conduct is related to the plaintiff's sex, for example, if it involved same-gender sexual desire, or hostility to the plaintiff's gender.

In this case, plaintiff failed to establish a question of fact whether Tucker's alleged conduct was directed at plaintiff because she is a woman. A reasonable trier of fact could not find that Tucker's occasional impertinent comments, or brief intrusions into plaintiff's personal space were motivated by sexual desire. Plaintiff also failed to demonstrate that Tucker's conduct arose from a hostility toward women, or from general hostility to the presence of women in the workplace. As discussed previously, plaintiff did not present any evidence that Tucker treated female employees differently. Accordingly, plaintiff failed to establish that the alleged conduct was gender-based.

Furthermore, as with the racial harassment claim, plaintiff failed to satisfy the respondeat superior element of this claim. None of plaintiff's internal grievances included complaints of sexual harassment. *Sheridan, supra* at 621. Accordingly, defendant was entitled to summary disposition with respect to plaintiff's claim for sexual harassment.

IV

Defendant next argues that it was entitled to summary disposition of plaintiff's retaliation claim. We agree. MCL 37.2701 prohibits retaliatory action against a person who assert their own or other persons' rights under the MCRA. To establish a prima facie case of retaliation, a plaintiff must show (1) that she engaged in a protected activity; (2) that the defendant knew of the plaintiff's involvement in the protected activity; (3) that the defendant's actions adversely

affected the plaintiff's employment; and (4) that the adverse employment action was causally connected to the protected activity. *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 273; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005). A plaintiff cannot prevail on a claim of retaliation without establishing that she engaged in an activity protected under the MCRA. *Barrett v Kirtland Comm College*, 245 Mich App 306, 318; 628 NW2d 63 (2001).

Plaintiff did not engage in a protected activity under the MCRA. MCL 37.2701(a) specifically prohibits retaliation against a person who "opposed a violation *of this act*, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing *under this act*." (Emphasis added.) Plaintiff's internal grievances did not raise complaints of any conduct that violated the MCRA. Although an employee need not specifically cite the MCRA when opposing a violation under the act, the employee "must do more than generally assert unfair treatment." *Garg, supra,* at 318-319. Plaintiff's grievances merely asserted unfair treatment, without linking that treatment to her sex or race.

Because plaintiff did not engage in a protected activity under the MCRA, she cannot establish a genuine question of material fact with respect to her retaliation claim. The trial court erred in denying defendant's motion for summary disposition of this claim.

V

Finally, defendant argues that it was also entitled to summary disposition of plaintiff's claim for intentional infliction of emotional distress. We agree. To establish a claim for intentional infliction of emotional distress, a plaintiff must prove the following elements: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Hayley v Allstate Ins Co,* 262 Mich App 571, 577; 686 NW2d 273 (2004). The conduct complained of must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. *Id.* A defendant is not liable for mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. *Lewis v LeGrow*, 258 Mich App 175, 196; 670 NW2d 675 (2003). Whether the offending conduct is extreme and outrageous is initially a question of law for the court. *Id.* at 197. Where reasonable minds may differ, the jury decides whether a defendant's conduct is so extreme and outrageous as to warrant liability. *Id.*

Tucker's treatment of plaintiff was not sufficiently outrageous or extreme to satisfy the elements of this tort. Tucker's workplace tirades, impertinent comments, and brief physical contact with plaintiff were, at worst, unfair and obnoxious, but they are better characterized as "petty oppressions" or "insults" and "indignities" than "atrocious and utterly intolerable" conduct. This Court has found that more egregious workplace conduct falls short of the extreme and outrageous conduct necessary to support a claim for intentional infliction of emotional distress. See *Meek v Michigan Bell Tel Co,* 193 Mich App 340, 346; 483 NW2d 407 (1991), and *Trudeau v Fisher Body Div, Gen Motors Corp*, 168 Mich App 14, 20; 423 NW2d 592 (1988). The trial court erred in denying defendant's motion for summary disposition of this claim.

Reversed.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood